

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE:** B-215831

**DATE:** October 18, 1984

**MATTER OF:** Henry B. Jenkins -- Waiver of Overpayment of Severance Pay

**DIGEST:**

An employee, who received severance pay following separation due to a reduction in force, was later granted a retroactive disability retirement. Payment of the retroactive retirement annuity resulted in an erroneous overpayment of the severance pay. Repayment of the total amount of severance pay is waived under 5 U.S.C. § 5584 (1982) where there is no evidence the employee knew or should have known of the overpayment either when he received the severance payments or when he received the retroactive annuity payment. B-166683, May 21, 1969, distinguished.

This responds to the request of Mr. Henry B. Jenkins for waiver of repayment of severance pay he received after his position within the Economic Development Administration (EDA) was eliminated in November 1980. Mr. Jenkins was later granted a retroactive disability retirement, and thus the severance pay became an overpayment. We find that the overpayment may be waived, as described more fully below.

In April 1980, Mr. Jenkins, a Public Information Officer for the EDA, applied for disability retirement, and he used his accumulated sick leave and annual leave from April 1980, until October 10, 1980. In September 1980, the Office of Personnel Management (OPM) denied his request for a disability retirement. Mr. Jenkins appealed the OPM determination.

In November 1980, Mr. Jenkins' job was eliminated pursuant to a reduction in force. He was separated from the EDA and started receiving severance pay in November 1980. For the period from November 1980 to November 1981, Mr. Jenkins received \$50,112.50 in severance pay. He received unemployment compensation thereafter.

In January 1982, OPM again denied Mr. Jenkins' request for disability retirement. However, in May 1982, the Merit Systems Protection Board reversed and ordered

OPM to grant him a disability retirement. The disability retirement was granted retroactive to October 11, 1980, and Mr. Jenkins received a lump-sum retroactive annuity payment in the fall of 1982. He was also notified by OPM in September 1982 that severance pay is not payable where the requirements for an immediate annuity are met. A separate notice from OPM was sent to the EDA advising that Mr. Jenkins might be indebted to EDA for that severance pay.

Our Claims Group waived \$34,405.18 of the severance pay claim on February 28, 1984, an amount which represents the difference between the severance payment and the retroactive annuity payment. In his appeal to our Office, Mr. Jenkins requests waiver of the remaining balance of \$15,707.32.

Our Office is authorized to waive claims for overpayment of pay and allowances under 5 U.S.C. § 5584(a), where the collection of such claims would be against equity and good conscience and not in the best interests of the United States.

Implementing regulations issued by our Office elaborate upon these standards as follows:

"Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee \* \* \*. Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee \* \* \* fails to bring the matter to the attention of appropriate officials. \* \* \*" 4 C.F.R. § 91.5(c) (1984).

The overpayment in Mr. Jenkins' case resulted from OPM's erroneous denial of a disability retirement to him in September 1980. The record indicates no fraud or misrepresentation on Mr. Jenkins' part. The remaining issue is whether Mr. Jenkins is at fault for his overpayment, that is, whether the payment of the retroactive annuity or the severance pay constituted an "unexplained increase in pay or allowances which would require a reasonable person

to make inquiry concerning the correctness of his pay \* \* \*." 4 C.F.R. § 91.5(c) (1984).

Our Office has held in previous cases that if an employee "knew or should have known" that the overpayments were erroneous, waiver will be denied, pursuant to the statute and the implementing regulations. Philip W. McNany, B-198770, November 13, 1980; and Vivian J. Lucas, B-190643, July 6, 1978.

In the present case, Mr. Jenkins states that while he was appealing the denial of his disability retirement application, he spent the severance pay he received from November 1980 to November 1981, and that when he received the retroactive annuity payment, he spent that amount for attorney fees, income taxes, and repayment of the unemployment compensation he received since November 1981. There is no evidence that, at the time Mr. Jenkins received the retroactive annuity payment, he knew that the prior severance pay became an erroneous payment or that the amount representing his retroactive retirement annuity might be applied against his indebtedness for the severance pay. The document Mr. Jenkins received from OPM concerning his disability retirement and payment of severance pay does not, in our opinion, constitute notice of an overpayment which would require him to inquire as to the correctness of the payment.

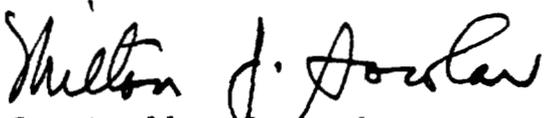
The present case stands in contrast to our decision in B-166683, May 21, 1969, where we limited waiver under similar circumstances to the amount of the net indebtedness, i.e., the difference between the severance pay and the retroactive annuity payment. The basis for our holding in B-166683, which was not clearly set forth in our analysis, was that the annuitant recognized the overpayment and set aside the money for refund. Since it appears that Mr. Jenkins did not recognize the overpayment and there is no presumption that he should have known of the overpayment, our holding in B-166683, cited above, is distinguished on the facts presented in this case.

It is also clear in this case that at the time Mr. Jenkins received his severance pay, he had no knowledge that his receipt of such pay would become erroneous. His initial application for disability retirement was

1101  
B-215831

denied by OPM in September 1980 and again in January 1982. He cannot reasonably be expected to have foreseen the reversal of OPM's decision by the Merit Systems Protection Board. In fact, his severance pay was completely exhausted before OPM reaffirmed its denial of his application in January 1982, thus giving rise to his appeal to the Board. Therefore, we find no evidence that Mr. Jenkins "knew or should have known" at the time he received the severance payments that such payments would be erroneous.

Accordingly, we hold that the entire amount of severance pay is waived pursuant to 5 U.S.C. § 5584 (1982) and 4 C.F.R. Parts 91-93 (1984).

  
Acting Comptroller General  
of the United States